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SUPREME COURT, U. S.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

OTIS PATRICK,

Petitioner

versus

STATE OF MISSISSIPPI,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1971

NO. _____

OTIS PATRICK,

Petitioner

-v-

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above-entitled case on June 18, 1971. Rehearing was denied on June 28, 1971.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 249 So. 2d 667 and is set forth in the Appendix, infra, p.1.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on June 18, 1971, rehearing was denied June 28, 1971.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3), petitioner having asserted below and asserting here deprivation of rights as guaranteed by the due process clause of the 14th Amendment to the United States Constitution and Section 14 of the Mississippi Constitution.

QUESTION PRESENTED

Mr. Clyde Morrow, one of the persons called for jury duty and seated in the jury box, responding to a question by the trial Judge stated in open court during the vior dire examination "I think they got the right fellow" or "right man", or words to that effect.

At the time Mr. Clyde Morrow made this statement there were eleven other persons seated in the jury box as well as Mr. Clyde Morrow, and a remaining number of the venire called for jury duty pursuant to petitioner's trial were seated in the court room, all out of which a trial jury was to be selected. Notwithstanding whether Mr. Clyde Morrow actually served on the trial jury, the rest of those remaining in the jury box and out in the court room, all out of which a trial jury was to be selected, heard this response made by Mr. Clyde Morrow.

Petitioner's attorney moved for a mistrial, the ground being obvious that appellant's attorney made such motion on the contention that this statement made by Mr. Morrow

was prejudicial to petitioner's case. At the conclusion of the motion for mistrial the trial court overruled same, and jurors were selected from those persons who had heard Mr. Morrow's opinion of the guilt of petitioner. This was not a mere indication by Mr. Morrow that he had a fixed opinion. It was that and more. Not only did Mr. Morrow indicate that he had an opinion but he further indicated that his opinion was that petitioner was guilty.

Petitioner herein was charged with the offense of willfully, unlawfully, and feloniously, by his culpable negligence, of killing and slaying Luther Tadlock and Mrs. Ouida Tadlock, human beings, contrary to the form of Statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

The evidence adduced upon the trial of petitioner in the state's attempt to make a prima facie case of manslaughter, as charged against petitioner was insufficient in that the state failed to prove culpable negligence. Under these circumstances, does petitioner's conviction offend the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Section Fourteen of the Mississippi Constitution.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Section Fourteen of the Mississippi Constitution.

This case also involves Section 2232, Mississippi Code 1942, Annotated, Recompiled,

which states the following:

> Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided in this chapter, shall be manslaughter.

STATEMENT

This cause presents the following issues:

1. Whether a prospective juror, while being questioned on a vior dire examination may respond to an interrogatory directed to him by orally indicating in the presence of the other prospective jurors his opinion of the guilt of a defendant without same being prejudicial to a defendant's cause.

2. Whether there was sufficient competent evidence adduced upon the trial of petitioner to prove culpable negligence of petitioner.

Mr. Clyde Morrow, responding to a question by the trial Judge stated in open court during the vior dire examination that he thought right fellow had been gotten.

At the time Mr. Clyde made this statement there were eleven others seated in the jury box as well as Mr. Clyde Morrow, and a remaining number of the venire called for jury duty pursuant to appellant's trial were seated in the court room, all out of which a trial jury was to be selected.

Notwithstanding whether Mr. Clyde Morrow actually served on the trial jury the rest of those remaining in the jury box and out in the

Court room all out of which a trial jury was to be selected, heard Mr. Morrow say: "I think they got the right fellow" or right man.

Appellant's attorney moved for a mistrial, the ground being obvious that appellant's attorney contended that this statement made by Mr. Morrow was prejudicial to appellant's case. At the conclusion of the motion for mistrial the trial court overruled same and jurors were selected from those who had heard Mr. Morrow's opinion. Had Mr. Morrow merely indicated that he had a fixed opinion as to the guilt or innocence of appellant without relating what that opinion was the results would have been different and under such circumstances a motion for a mistrial would not have been one to have been well taken.

The evidence adduced upon the trial in the state's attempt to make a prima facie case of Manslaughter, as charged against appellant was insufficient in that the state failed to prove culpable negligence. Culpable negligence "is the want of that unusual and ordinary care and caution in the preformance of an act usually and ordinarily exercised by a person under similar circumstances and conditions." The state failed to show the want of the exercise of such care by appellant.

The state attempted to show that appellant had been drinking intoxicating liquor and that he was under the influence of same at the time of the alleged incident. However, such proof was never shown. The state merely showed at the time the appellant was seen by Dr. Stone, some hour or hour and one half at least after the alleged accident, counting driving time along from the scene of the

accident to the hospital in Jackson, Mississippi, where Dr. Stone first saw appellant, that appellant had the smell of alcohol in his vomitage. Although the exact time appellant remained at the hospital in Forest, Mississippi is not shown, it was shown that he was there for some time for emergency treatment.

Mr. Harrell's testimony shows that appellant was carried from the scene of the alleged accident about 5:00 p.m. on the date thereof. Dr. Stone's testimony shows that he did not see appellant for the first time until about the hour of 7:00 p.m. two hours later. According to Sheriff Harrell's testimony when he was called by appellant, Sheriff Harrell indicated from his testimony that the total driving time from the scene of alleged accident to the hospital in Jackson, Mississippi would total about one and one-half hour. This means that appellant must have remained in the Forest hospital, where he was first taken, for a period of one-half hour, or about. Yet, there was no doctor or other witness presented by the state to testify to any detection of any alcoholic smell relative to appellant at that time.

Sheriff Harrell testified that he did not examine appellant at the scene of the alleged accident. There was not any other testimony that appellant was examined at the scene of the accident or that any detection of alcohol was noticed relative to appellant. Anything could have happened to appellant two hours after he had been driving his motor vehicle, expecially when he was detained at a hospital in Forest for about thirty minutes before he was moved to the hospital in Jackson. The time to have determined whether he had been drinking intoxicating liquor should have been at the scene of the accident, or not certainly

any later than when he was carried to the hospital at Forest. The State simply did not show that appellant had been drinking and had alcohol of any form in him at the time of the accident. Appellant could have reasonable had some form of medication with alcoholic content at the Forest hospital.

Secondly, if this Court deems that the state did prove appellant had alcohol in him at the time of the accident there is no proof that appellant was under the influence of it. Drinking itself is no proof of culpable negligence. There is no law against drinking and driving an automobile unless one is under the influence of it. The state failed to prove that.

Sheriff Harrell stated that he was following the Tadlock motor vehicle about a distance of one hundred and fifty feet. He further stated that the Tadlock's motor vehicle had a trailer attached to its rear hauling two cows. He further stated he saw appellant's automobile a split second before the collision. This nulifies and completely voids his testimony that he saw appellant in a curve meeting the Tadlock motor vehicle traveling at a rate of seventy-five miles per hour. (Sheriff Harrell's car was one hundred and fifty feet behind the Tadlock's motor vehicle but was not involved in the accident).

Mr. Clyde Valentine, the patrolman, under cross-examination, realizing what appellant's attorney was driving at, in his zeal for conviction of appellant, when asked what the maximum speed one could make without turning over, responded as follows:

> "I don't try to turn it over, though."

This court can take one look at the curve in exhibit (1) of the transcript and I believe it will be convinced that appellant could not possibly have been doing seventy-five miles in that curve. If he had been he would have run off of the road or turned over before his vehicle struck the Tadlock vehicle. This, coupled with the fact Mr. Harrell was appellant's vehicle only a split second before it struck the Tadlock vehicle is in effect no creditable testimony on its face of what the circumstances were revelant to the alleged collision. As to culpable negligence the state proved nothing. This type of evidence adduced by the state should have never gone to the jury.

Appellant testified that in the curve he was traveling not more than forty or forty-five miles per hour and that if he drove faster than fifty miles per hour his wheels would shimmy. The defect of appellant's vehicle was to the extent that appellant could not effectively drive beyond fifty miles per hour. If appellant had been driving seventy five miles per hour he would have turned over or run off of the road before he reached the Tadlock vehicle and there would never have been any occasion for a trial of appellant or for the writing of this brief. There simply would have been no collision with the Tadlock automobile.

Appellant, along with six others had drank two half pints of liquor. This showing, by appellant's testimony, indicates that appellant had consumed one seventh of one pint of liquor about one to one and one-half hour prior to the accident.

Appellant further testified that the Tadlock vehicle had strattled the line and as a

result thereof struck appellant's vehicle. Further testimony of appellant shows that there was nothing he could have done to avoid the accident and that he failed to do so. Mr. Harrell's testimony that he was appellant's vehicle only a split, second before it collided with the Tadlock vehicle, notwithstanding any other testimony of Mr. Harrell, shows that there is no clear dispute of anything appellant testified to in regard to the position and speed of the motor vehicles prior to and at the time of the alleged accident.

It is interesting to note that with an accident of the alleged magnitude of the one in question that the testimony of one of the law inforcement officer or officers is that the debris was confined solely to the Tadlock lane. A collision of the magnitude alleged in this cause, if true, would have spread debris in both lanes, and almost over the entire immediate area. It would not have been carefully confined to the land in which Mr. Tadlock was traveling.

It is well settled that the jury decides the facts, but when it is shown that there is a curve with an angle therein to the extent that it would be impossible to do seventy-five miles therein, that there is solely one person who saw appellant's vehicle a split second before the alleged accident, that there was no showing that appellant had the smell of alcohol until about hours after the alleged accident, it is humanly impossible for a reasonable prudent jury, who is unbiased, to return a verdict of guilty for this appellant. If appellant is wrong, then there should be some limit on what a jury can find that can stand beyond question by an appellate court.

REASON FOR GRANTING THE WRIT

The decision below premits the petitioner to be subjected to remarks by prospective jurors which are prejudicial to his cause.

The trial Court, notwithstanding petitioner's motion for a mistrial, refused to sustain said motion, although a prospective juror had orally indicated his opinion of petitioner's guilt by stating that petitioner was the tight man. The failure of the trial Court to sustain petitioner's said motion may have had an effect upon the jury's finding of guilt of petitioner.

The decision below deems the State of Mississippi to have made out a prima facie case of manslaughter notwithstanding that there was no competent showing of culpable negligence of the petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

R. JESS BROWN
125-1/2 North Farish Street
Jackson, Mississippi 39201

Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the above and foregoing Petition for Writ of Certiorari to the Supreme Court to the Honorable A. F. Summer, Attorney General, by mailing a copy of same to him at his post office address, New Capital Building, Jackson, Mississippi, United States Mail, postage prepaid.

This ____day of _____, 1971.

_____

R. JESS BROWN

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,400

OTIS PATRICK

V.

STATE OF MISSISSIPPI

GILLESPIE, PRESIDING JUSTICE:

Otis Patrick was convicted in the Circuit Court of Scott County of involuntary manslaughter and sentences to serve a term in the State Penitentiary. From this judgment, he appeals to this Court.

The facts are in sharp dispute. The only eye-witness who testified, except the appellant himself, was Clell Harrell, Sheriff of Scott County. Harrell and his wife were travelling south in the southbound lane of Highway 21 in Scott County, Mississippi, about 150 feet behind a GMC pickup truck pulling a 14 foot trailer containing two cows. The truck-trailer was being driven by Luther Tadlock, and his wife Ouida was a passenger. Highway 21 is an asphalt highway designed for two lanes of traffic. The weather was fair, and the road surface dry. The sheriff testified that he and the Tadlock vehicle were travelling between 50-60 miles per hour when he saw an automobile being driven by Otis Patrick travelling north at a speed of 70-75

miles per hour. When Harrell first saw the Patrick vehicle, it was about 200 feet south of the Tadlock vehicle in the west or southbound land. The sheriff further testified that the Tadlock truck cut to the right but was struck by Patrick's automobile in the southbound traffice land. The sheriff further testified that the Tadlock truck cut to the right but was struck by Patrick's automobile in the southbound traffic land. The Tadlock vehicle burst into flames, and both Mr. and Mrs. Tadlock were killed. Their bodies were removed after the fire was extinguished. Patrick was removed to the emergency room of the hospital and the doctor who first saw him stated that Patrick was intoxicated, smelled of alcohol, was ranting and cursing, and was in an uncontrollable state. Clyde Valentine, highway patrolman, investigated the accident a short time after its occurence. He testified that most of the debris was in the southbound lane of traffic. Otis Patrick disputes the State's version of the facts and testified that he and seven others had consumed only two one-half pints of whisky shortly before the accident. He stated that he was able to drive as if he had nothing to drink; he was traveling 40-45 miles per hour, and he noticed the Tadlock vehicle astraddle the center line of the highway when he was 175 years away from it. He testified that the last thing he remembered was applying his brakes in order to avoid collision with the Tadlock vehicle.

The accused argues four assignments of error. He first contends that the trial court erred in overruling defendant's motion for a mistrial. This assignment is based upon a motion dictated by defendant's counsel as follows:

> Based upon the statement made by one of the prospective jurors, Mr. Clyde Morrow, in response to questions of the Judge, stated in open Court, "I think they got the right fellow," or right man. Based upon this statement made in--during the questioning of the prospective jurors, comes now the Defendant in this cause and moves this Honorable Court for a mistrial.
>
> By the Court: The motion is overruled.

We are of the opinion that this assignment is not well taken. The juror Clyde Morrow did not serve on the case. In Franklin v. State, 189 Miss. 142, 169 So. 787 (1940), which involved a murder prosecution in which a venireman indicated his views about the guilt of the defendant during the voir dire examination, this Court stated:

> We are of the opinion that there was no reversible error . . . because the venireman said in the presence of the others upon his trial that he thought they were guilty . . . . (189 Miss. at 166, 196 So. at 792).

Moreover, this motion was not substantiated either by proof or a special bill of exception. Motions are always at issue. Harvey v. State, 218 So. 2d 9 (Miss. 1969).

The second proposition argued by the accused is the contention that the trial court erred in overruling the motion for a directed verdict when the state closed its case.

The third question argued by the accused

is based on the action of the trial court in refusing the peremptory instruction. The fourth question raised is the contention that the verdict was contrary to the overwhelming weight of the evidence. All of these assignment of error concern the sufficiency of the evidence.

The defendant was indicted under Mississippi Code 1942 Annotated, Section 2232 (1956), which is as follows:

> Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this chapter, shall be manslaughter.

In Ford v. State, 226 So. 2d 378 (Miss. 1969), the Court held that if the accused was guilty of such gross negligence as to evince wanton, reckless disregard for the safety of human life, or such indifference to the consequences of his act as to render his act tantamount to willfulness, he was guilty of culpable negligence under this statute. In the case before us, the testimony of the sheriff is clear and unequivocal concerning the manner in which the defendant was operating his motor vehicle immediately before and at the time of the fatal collision. The physical facts corroborate the sheriff. The jury was fully justified in rejecting the defendant's testimony and accepting that of the sheriff, the doctor, and the highway patrolman, and in returning a verdict of guilty. We find no merit in the last three assignments of error.

A careful review of the evidence and the

several contintions made on this appeal reveal no reversible error. Therefore, the judgment of conviction is affirmed.

AFFIRMED.

RODGERS, JONES, BRADY, AND INZER, JJ., CONCUR.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

July 23rd, 1971, Vacation Term ::::::::::::

Otis Patrick.

46,400 vs.

State.

ORDERED THAT the application for stay of mandate and enforcement of the judgment is sustained provided petition for writ of certiorari to the Supreme Court of the United States if filed within time provided by rules of the Supreme Court of the United States, and, provided further that a prompt bail bond be filed within said time in the penal sum of $5,000. Said bond to be approved by the Circuit Clerk of Scott County.

MINUTE BOOK "BP", PAGE 397.

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

September 20, 1971, Court Sitting ::::::::::

Otis Patrick.

46,400 vs.

State of Mississippi

This cause having come on to be heard upon the motion of appellant for an extension of time and the Court having considered the same, it is the opinion of this Court that said motion should be, and it is hereby sustained, the appellant is granted 30 days additional time from the original due date, in which to perfect a petition for Writ of Certiorari to the United States Supreme Court.

MINUTE BOOK "BP", PAGE 409.